IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Jail Appeal No.124/2003

Pappu Son of Shri Gulab Chand ...Accused Appellant
Versus
State of Rajasthan through Public Prosecutor
...Respondent

Date of Judgment ::: March 9,2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Ms. Rajesh Kandwal, Amicus Curiae, for appellant
Shri B.S. Chhaba, P.P., for the State

**By the Court**:-

This Jail appeal on behalf of accused appellant Pappu Son of Gulab Chand, is directed against the judgment and order dated 8th August 2002 of the learned Special Judge (N.D.P.S. Act), Chhabra, whereby the accused appellant was convicted and sentenced under Section 8/18 of the N.D.P.S. Act, 1985 (for short, 'the Act') to ten years rigorous imprisonment and a fine of Rs.1,00,000/-; in default of payment of fine, to further additional undergo six months' rigorous imprisonment.

Brief facts of the case relevant for disposal of this appeal are that on 10.4.1997, PW-8 Jai Narain Sher, Deputy Superintendent of Police, Chhabra, lodged

First Information Report at Police Station Chhipa Barod, wherein it was alleged that accused Pappu S/o Gulab Chand was accused and arrested in case No.128/97 under Section 454, 380, IPC, by PW-15 Jai Lal Verma, S.H.O., Police Station Chhipa Barod and when he was in custody he gave an information under Section 27 of the Indian Evidence Act to PW-15 Jai Lal Verma, S.H.O., that the stolen opium of his share has been hidden by him in his field. The details of field/place were also given. The said information was reduced in writing. The information was sent to the Superintendent of Police, Baran. The accused was taken to his field. Thereafter the accused was apprised of his right about search either in presence of Magistrate or Gazetted Officer. Two independent witnesses were called upon and thereafter the contraband 'opium' weighing 4kg. 300 gram was recovered by digging the particular place of field as per information given by accused, in polythene bag and the net weigh of the contraband was 4kg. 250 gram. Two samples of 50 gram each were taken and sealed. The remaining contraband weighing 4kg. 150 gram was sealed separately. The case was investigated and on completion of investigation a charge sheet was filed against the accused appellant under Section 8/18 of the

Act.

The learned trial court framed charge against the accused appellant for the offence under Section 8/18 of the Act. The accused denied the charge and claimed to be tried. The prosecution examined 17 witnesses. Thereafter statement of accused was recorded under Section 313 Cr.P.C. No evidence was led in defence. The learned trial court after hearing both the parties, convicted and sentenced the accused appellant as stated above.

The learned Amicus Curiae, appearing on behalf of the accused appellant, contended that there is violation of Section 42 and 50 of the Act in the present case which are mandatory provisions. It was contended that the notice given to the accused appellant under Section 50 of the Act was not in accordance with the provisions of the law. It was also contended that there was no secret information about contraband in the present case and the so called information was reduced in writing on the basis of the information given by the accused himself, therefore, the action of the respondents cannot be said to be in accordance with Section 42 of the Act.

It was also contended that from the recovery

memo it is clear that two samples of 50 gram each were taken and sealed and sent to FSL for examination whereas Exhibit P-12, FSL Report, shows that sample weighing 43 gram was received in the laboratory, therefore, it cannot be said that the sample which was seized in the case was sent to the FSL for examination. This fact creates doubt on the prosecution case. The learned counsel for the accused appellant referred to the decision of this Court in Mangi Lal Vs. State of Rajasthan, S.B. Criminal Jail Appeal No.45/96, decided on 24.3.1998, Sushil Sharma Vs. State of Rajasthan, 2000 Cr.L.R. (Raj.) 549 and Biram Vs. State of Rajasthan, S.B. Criminal Jail Appeal No.25/2000, decided on 15.5.2001.

Learned counsel for the appellant further contended that at the time of recording information the accused was arrested in Case No.128/97 under Section 454, 380 IPC and a charge-sheet was filed against him in the said case. The accused was charged for the offence under Sections 454, 380 IPC. The said case was registered as Criminal Case No.765/2003 (240/97) and it was tried by the Court of Judicial Magistrate, 1st Class, Chhipa Barod, District Baran. The learned Judicial Magistrate, vide his judgment dated 23.8.2005,

observed that the recovery of contraband (theft article) is not proved beyond reasonable doubt and, therefore, acquitted the accused appellant as well as other co accused persons. Therefore, it was contended that when the accused has been acquitted in Case No.128/97 registered under Section 454, 380 IPC wherein the theft article was nothing but the contraband, which is subject matter of present case and the recovery of contraband was found to be doubtful in the said case itself then the accused appellant cannot and should not be convicted in the present case on the basis of the recovery of same contraband article for which the Judicial Magistrate has observed that the recovery of the same is doubtful, and acquitted the accused of the charge under Sections 454, 380 IPC. A certified copy of the judgment dated 23.8.2005 passed by the Judicial Magistrate, 1st Class, Chhipa Barod, District Baran, in Criminal Case No.765/2003 (240/97) has been produced before this court during the course of arguments and the same is marked as Court Document No.1, (C-1).

The learned Public Prosecutor, on the other hand, contended that the recovery of contraband in the present case was made from public place, therefore, the provisions of Section 50 of the Act are not applicable

in the present case. It was further contended that variance in weighment of samples of the contraband as stated by the learned counsel for the appellant is not prejudicial in any manner to the accused, therefore, the accused is not entitled to any benefit. He contended that the judgment of the learned trial court is based on oral and documentary evidence and the conviction and sentence of the accused appellant is quite legal and in accordance with the provisions of law.

I have considered the rival submissions of the learned counsel for both the parties and minutely scanned the impugned judgment and the record of the trial court.

In Mangi Lal's case (supra) this Court gave the benefit of doubt to the accused on the basis of variance in the weighment of sample seized and sent to the FSL. The same benefit was given by this Court in Sushil Sharma's and Biram's cases (supra).

In Rajesh Jagdamba Avasthi Vs. State of Goa, (2005) 9 SCC 773, the Hon'ble Supreme Court also considered the effect of variance in weighment of sample seized and sent to FSL for examination and held that in absence of explanation about this discrepancy, it renders the case of the prosecution doubtful. The

Hon'ble Supreme Court observed as under:-

> "We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the junior scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity

> actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

So far as the facts of present case are concerned it is clear from Exhibit P-3, the recovery and seizure memo, that two samples of 50 gram each were taken and this recovery memo has been proved by the prosecution. The forwarding letter to the Forensic Science Laboratory has not been placed on the record. There is no evidence that seal which was used in sealing the sample was sealed and the same was sent to FSL along with the samples. The analysis report dated 8.8.1997 sent by the State Forensic Science Laboratory, Rajasthan, Jaipur (Exhibit P-12), makes it clear that the sample weighing 43 gram was received in the Laboratory for chemical examination. Therefore, it cannot be said that the same sample, which was seized in the case, was sent for chemical examination and thus

this discrepancy has prejudiced the case of the accused appellant. The report dated 8.8.1997 does not confirm that the seal used at the time of seizure of contraband and sample, was sent along with the sample. Therefore the submission of the learned counsel for the accused appellant is fully covered by the judgment of the Hon'ble Supreme Court in Rajesh Jagdamba Avasthi's case (supra), and accused-appellant is entitled to get the benefit of doubt.

I have also considered the judgment dated 23.8.2005 passed by the Judicial Magistrate, 1st Class, Chhipa Barod, in Criminal Case No.765/2003 (240/97), whereby the accused has been acquitted of the offence under Sections 454 and 380 IPC arising out of case No.128/97 registered at Police Station Chhipa Barod, wherein he was arrested and during his custody he gave the information about the present contraband. The Judicial Magistrate has observed that the recovery of contraband itself is doubtful and no conviction can be based on the basis of such recovery in the case.

In view of the above discussion, the accused appellant is entitled to get the benefit of doubt, therefore, I do not intend to refer and discuss the other submissions of the learned counsel for the

accused appellant.

Consequently, the appeal is allowed. The impugned judgment dated 8.8.2002 passed by the trial court is set aside. The appellant is acquitted. The accused is in jail and he may be set at liberty forthwith, in case his custody is not required in any other case.

(Narendra Kumar Jain) J.

//Jaiman//